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SUPREME COURT U. S.

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 196.

WILLIAM F. KESSLER

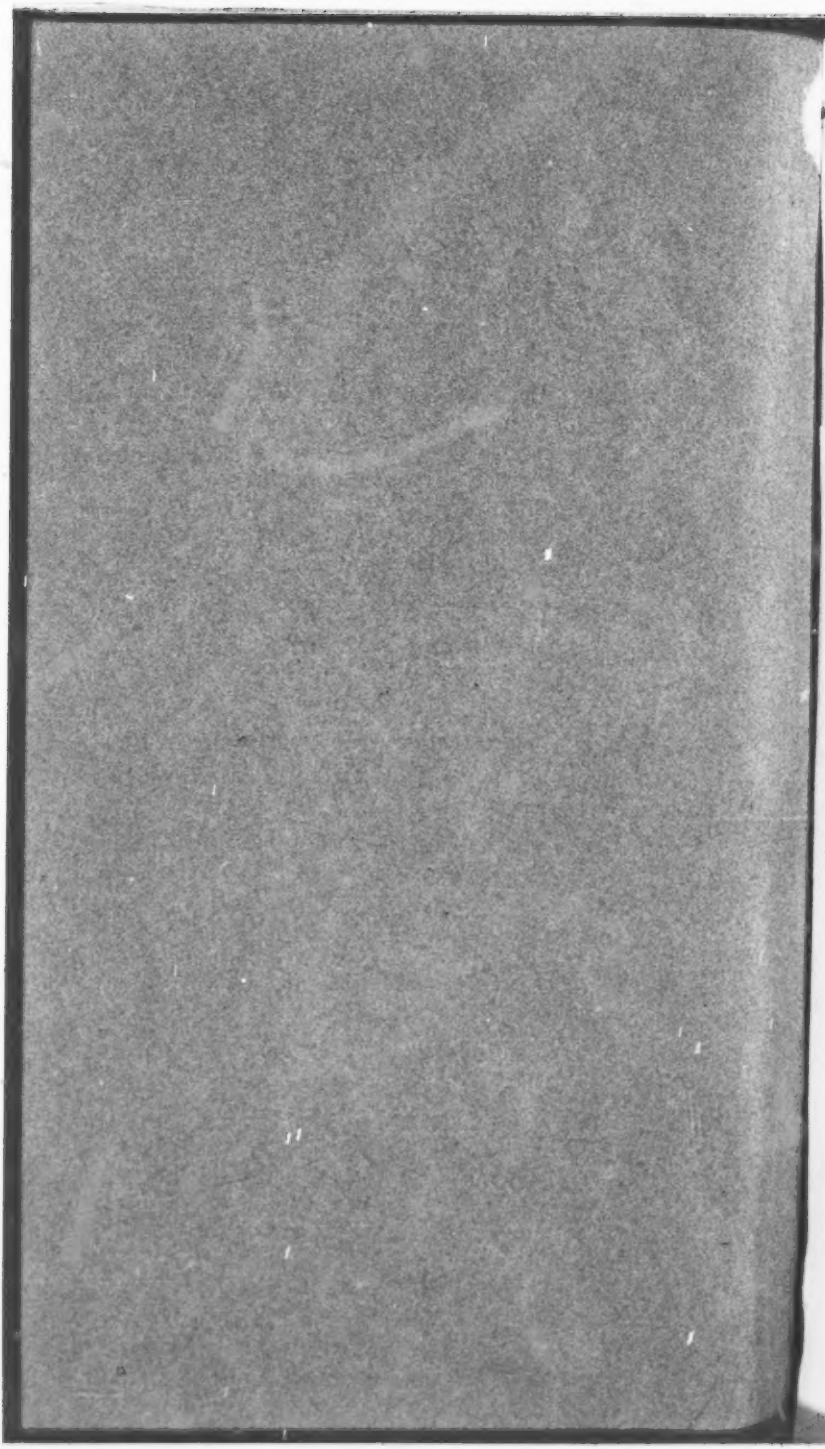
vs.

GEORGE S. ELDRED.

PETITION FOR REHEARING.

CHARLES C. LINTHICUM,
LOUIS K. GILLSON,
Counsel for Petitioner.

Business Bros., Law Printers, 158 Dearborn St., Chicago.



IN THE

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Comes now the said George S. Eldred, and petitions this Honorable Court for a rehearing upon the questions certified to this court by the United States Circuit Court of Appeals for the Seventh Circuit, and for grounds of such petition shows:

First. That, as appears from the statement of facts accompanying the questions certified by the Circuit Court of Appeals for the Seventh Circuit to this court for its instructions, your petitioner is the owner of the Chambers patent, and is a manufacturer of the cigar lighters covered by the said patent.

And your petitioner further shows that the manufacture of the cigar lighters covered in and by said patent is

your petitioner's sole business; that he has been engaged therein for many years, and has a great deal of money invested in the manufacturing and marketing of said articles; that he has had and enjoyed an extensive trade in the said articles throughout the United States, and without material competition or interference from other manufacturers save the said William F. Kessler.

Second. Your petitioner further shows that, as appears by said statement of facts, your petitioner obtained the judgment of the Circuit Court of Appeals for the Second Circuit that said Chambers patent was valid, said decision having been rendered long after the decision in the Circuit Court of Appeals for the Seventh Circuit in favor of the said Kessler, and that the structure which was held to be an infringement in said case in the Second Circuit was identical with the Kessler lighter held not to be an infringement in the Seventh Circuit; that your petitioner has a large business in said cigar lighters in the said Second Circuit which will be destroyed if, in accordance with the decision of this court, any person purchasing said Kessler lighters is free to sell and deal in the same within said Second Circuit notwithstanding your petitioner's patent has been held to be valid and infringed by the Court of Appeals of said Second Circuit.

Third. Your petitioner further shows that since the filing of the bill of complaint herein, the Circuit Court of the United States for the Western District of New York, in the suit of your petitioner against said Breitweiser, has overruled a plea setting up the judgment in the suit of your petitioner against Kessler in the Seventh Circuit, and has entered a final decree against said Breitweiser therein, and that no appeal has been taken from the said decree; that the defense of the said suit against Breit-

weiser was conducted solely by the said William F. Kessler, and that said Kessler fully submitted himself to the jurisdiction of said court, and interposed said plea before the filing of the bill herein, which said suit was pending at the time said bill herein was filed, and that by reason thereof the said Kessler should have been held barred from maintaining this suit.

Fourth. Your petitioner further shows that the question involved herein is of great public importance; that, as he is advised and believes, this question has never before been raised or decided in any court in this country; that your petitioner employed counsel to assist in the trial of this said cause, and relied upon the said counsel to be present at the time the same was reached upon the call of the docket of this court, but that the said counsel, as well as the counsel for the said Kessler, was at that time engaged in preparation for the argument of the case of The Indiana Manufacturing Company against The J. I. Case Threshing Machine Company in the Circuit Court of Appeals for the Seventh Circuit, which said case was also of vast importance, as your petitioner is informed and believes, and on the argument of which the counsel for your petitioner and for the said Kessler were both required to be present and were present and made oral arguments therein, to wit, on the 31st day of January and the 1st day of February, 1907, at about which time this case would have been reached for trial in this court; and that owing to the impossibility of attending upon the hearing in this court and in the Court of Appeals the counsel for the parties hereto, by agreement between themselves, submitted this case upon briefs, and without oral argument. Your petitioner is informed that the said suit of The Indiana Manufacturing Company against The J. I. Case

Threshing Machine Company has now been brought before this court on petition for a writ of certiorari, which is to be presented concurrently with the presentation of this petition.

Fifth. Your petitioner further shows that the effect of the decision of this court is to make practically worthless your petitioner's said patent and to destroy his business; and that, in view of the importance of the question involved herein, your petitioner is advised that a rehearing should be granted to enable the questions submitted to and answered by this Honorable Court to be more fully argued.

Sixth. Your petitioner further represents and shows to your Honors that this cause came into the Circuit Court of Appeals on an appeal from a decision sustaining a demurrer to the bill of complaint, and that the statement of facts contained in the certificate was taken from the bill of complaint alone, and are merely the allegations of the pleader, and were admitted by the demurrer, and which allegations your petitioner will be entitled to and will deny should his demurrer be overruled, with leave to answer; that said bill did not show that said Kessler had set up as a bar the decision in his favor in the Seventh Circuit by a plea in said Breitweiser suit. And your petitioner further represents and shows to your Honors that, in order to do justice to your petitioner, this Honorable Court should require to be sent up from the Circuit Court of Appeals for the Seventh Circuit the complete record herein, and also the record in the Circuit Court of Appeals for the Western District of New York in the suit of your petitioner against Breitweiser.

Seventh. Your petitioner further shows that, in view of the direct conflict of opinion between the Circuit Court of Appeals for the Seventh Circuit and the Circuit Court of Appeals for the Second Circuit, upon identically the same subject-matter, and upon identically the same point necessary to the decision in each case, this Honorable Court should require that the record in the original suit of your petitioner against Kessler in the Seventh Circuit, as well as the record in the suit of your petitioner against Kirkland in the Second Circuit, be also sent to this court for its consideration.

Eighth. Your petitioner further shows unto your Honors that the necessary effect of the decision of this court, as your petitioner is advised, is that your petitioner is not entitled to proceed in the suit against the said Breitweiser, and that if an injunction be awarded in the suit against your petitioner in accordance with the prayer of the bill, it will prevent your petitioner from enforcing his said decree against Breitweiser, notwithstanding that this court has said in its opinion that it expresses no opinion as to whether or not the judgment in favor of Kessler precludes your petitioner from enforcing said patent as to Breitweiser; and further, that the necessary effect and result of the decision of this court is that by an injunction granted by the Circuit Court of the United States for the Northern District of Illinois, the suit against the said Breitweiser cannot be further prosecuted, notwithstanding the assumption of the defense therein by Kessler.

Your petitioner therefore prays that a rehearing may be granted on the questions certified by this court.

GEORGE S. ELDRED.
Petitioner.

State of Illinois, County of Cook, ss.

Louis K. Gillson, being duly sworn, on oath deposes and says: I am solicitor and of counsel for petitioner hereinabove named; that I have read said petition and know the contents thereof and that the same is true except as to the matters therein stated on information and belief, and as to these matters I believe it to be true, and I further say that said petition is not filed for the purpose of delay, but that justice may be done.

LOUIS K. GILLSON.

Subscribed and sworn to before me this 25th day of May, 1907.

ELLA M. KLATCHER,
Notary Public.

I hereby certify that, in my opinion, the foregoing petition is well founded in point of law.

CHARLES C. LINTHICUM,
Counsel for Petitioner.

CHICAGO, May 25, 1907.